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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ROBERT TU et al.,

Plaintiffs and Appellants,

v.

VAN KHANH BUI,

Defendant and Respondent.

B218954

(Los Angeles County
Super. Ct. No. GC033675)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Joseph DeVanon, Judge. Affirmed.

Law Office of Walter R. Huff and Walter R. Huff for Plaintiffs and Appellants.

Case Knowlson & Jordan and Patrick Walsh for Defendant and Respondent.

Plaintiffs and appellants Robert Tu, David Tu and Ly Bich Tu (plaintiffs) appeal a judgment in favor of defendant and respondent Van Khanh Bui (Bui) following a motion for judgment.

In the previous trial, the trial court granted a motion for judgment (Code Civil. Proc., § 631.8),¹ after it erroneously held plaintiffs failed to establish by *clear and convincing evidence* that defendant Kenny Wong forged a deed to the real property located on Lexington Gallatin Road in El Monte (the Lexington property). We reversed and remanded for the trial court to reconsider the forgery claim pursuant to the *preponderance* standard.

On remand, the trial court properly reconsidered the matter pursuant to a noticed motion and determined plaintiffs failed to meet their burden to prove by a preponderance that Kenny Wong forged the Lexington deed. Therefore, the judgment confirming Bui's title as a bona fide purchaser of the Lexington property is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND²

This litigation relates to the validity of four deeds purportedly executed by decedent Hoa Le Wong (Mrs. Wong) shortly before her death conveying two parcels of real property to her husband, Kenny Wong. Two of the deeds related to the Ashmont property, which is not relevant to this appeal. The other two deeds related to the Lexington property, at issue herein.

1. Facts.

By way of background, in 1996, Kenny Wong married plaintiffs' mother, Mrs. Wong. The three plaintiffs are Mrs. Wong's children by a prior marriage.

¹ All further statutory references are to the Code of Civil Procedure, unless otherwise specified.

² The factual and procedural background is drawn in part from this court's previous decision in this matter. (*Robert Tu et al. v. Kenny Wong et al.* (Aug. 25, 2008, B202025 [nonpub. opn.].)

a. *The Lexington property, owned by Mrs. Wong before the marriage.*

Prior to the marriage, Kenny Wong and Mrs. Wong entered into a written prenuptial agreement. The prenuptial agreement specified the Lexington property would be retained by Mrs. Wong as “her sole and separate property.”

b. *The transfer of the Lexington property to Kenny Wong.*

Mrs. Wong was diagnosed with cancer in 1998 and died on July 6, 2001. Apparently, she died intestate because no will was found.

On June 2, 2001, about one month before Mrs. Wong’s death, Kenny Wong purportedly signed his wife’s name to a grant deed as well as a quitclaim deed to the Lexington property, conveying said property from Mrs. Wong as her sole and separate property to Kenny Wong, a married man, as his sole and separate property.

Kenny Wong testified he signed the deeds in the master bedroom of their home, in his wife’s presence. The two of them were there alone. He then took the signed deeds to the notary’s office. The deeds bore the official notarial seal of “Henry J. Suh Comm. #1278497.”³

c. *In 2002, Kenny Wong sold the Lexington property.*

In July 2002, Kenny Wong sold the Lexington property to Bui.

2. *Proceedings; the first trial.*

a. *Pleadings.*

Plaintiffs commenced this action in 2004 and filed the operative third amended complaint in June 2006. The named defendants included: Kenny Wong; his current spouse, Kimberly Wong; Suh, the notary who allegedly notarized the deeds in issue;

³ Kenny Wong testified he physically signed Hoa Le Wong’s name to deeds executed June 2, 2001, with her consent. The signatures that were notarized were the signatures of “Hoa Le Wong.” Because Mrs. Wong was not the actual signatory, these circumstances raised a question as to whose signature Suh was in fact authenticating. We also noted Kenny Wong’s testimony that he signed the deeds before he arrived at the notary’s office.

Bui, the purchaser of the Lexington property; as well as Thuan My Lam, Jennifer Tran Vu and Le Xuan Nguyen.

Plaintiffs pled causes of action to set aside fraudulent transfer of real property and sought damages and a judicial declaration the transfer of the Lexington by Kenny Wong was effectuated by a forged deed and that the purported conveyance was void as a matter of law.

b. Phase one of the trial.

Phase one of the trial lasted two days and dealt with whether the Ashmont property was Mrs. Wong's separate property or community property. Phase one resulted in a "nonsuit" in favor of the subsequent purchaser and the lender on the Ashmont property. Phase one of the trial is not pertinent to this appeal.

c. Phase two of the trial; statement of decision.

Phase two of the trial addressed whether Kenny Wong conspired with notary Suh to forge the deed to the Lexington property and whether the deeds were in fact forged.

At the conclusion of phase two, the trial court made findings of fact from the bench. In essence, the trial court found plaintiffs failed to prove that Kenny Wong intended to defraud plaintiffs' mother when he signed her name to the deeds. The trial court found for Kenny Wong, Suh as well as Bui, who purchased the Lexington property from Kenny Wong. The statement of decision sets forth the trial court's ruling as follows:

"1. Forgery of a document is a broader act than the mere signing of someone else's name; forgery requires a specific intent to defraud.

"2. In a civil matter involving a claim of forgery, the burden of proof is not a mere preponderance of the evidence; the evidence must be clear and convincing in order to sustain a finding of forgery.

"3. In this case, there was evidence of activity by the defendant Kenny Wong sufficient to raise some suspicion; the evidence showed that Kenny Wong signed the name of his wife, Hoa Le Wong, to the challenged deeds. However, the practice of

signing a spouse's name to a document is not so unusual or irregular as to establish, by itself, fraudulent conduct.

"4. In this case, there was evidence indicating that defendant Henry Suh may have in fact notarized the challenged deeds. However, the act of notarizing a fraudulent document does not in and of itself establish a conspiracy to commit fraud without a further specific intent to commit such fraud. *It was not proven by clear and convincing evidence that Henry Suh had any intent to commit fraud or forgery.*

"5. The record does not reflect that Kenny Wong took money from Hoa Le Wong; the evidence was that Mr. Wong liquidated certain assets and used the proceeds to pay outstanding debts of the marital community.

6. Plaintiffs demonstrated inconsistencies in Mr. Wong's testimony concerning his wife's consent to his signing her name to documents, but the Court was not convinced that this established any fraud. The Court notes that the evidence established that Mr. Wong appointed Mr. Vincent Nguyen, the husband of Plaintiff Ly Bich Tu, to act as the sales agent on the sale of the Lexington Gallatin property to defendant Van Khanh Bui, and that, upon completion of the sale, Mr. Wong paid a brokerage fee to Mr. Nguyen's company and divided the remaining proceeds equally with the Plaintiffs.

"7. Considering the evidence as a whole, the Court finds the Plaintiffs' evidence to be insufficient to find an intent to defraud by Mr. Wong.

"8. The Court finds that the prenuptial agreement between Mr. and Mrs. Wong appears to show Mrs. Wong's intent to hold the Lexington Gallatin property as her separate property; however, this does not change the Court's determination that the evidence presented by the Plaintiffs was insufficient to establish an intent to defraud on the part of Mr. Wong.

"9. *Because there was no forgery, the deed executed by Mr. Wong in his wife's name, transferring title to the Lexington Gallatin Property from Mrs. Wong to Mr. Wong, was not void, and was sufficient to pass title to Mr. Wong.*

"10. The Court finds that because there was no forgery on the deed itself, then there can be no act of forgery committed by the notary. The Court finds that there was no

connection established between Defendant Wong and Defendant Suh, no intent on behalf of Defendant Suh to commit any wrongful act against the Plaintiffs, and as such no finding of conspiracy.

“11. Upon completion of Phase 2, Defendant Henry Suh moved for judgment on the basis of the Court’s findings on the forgery issue. The Court further finds that Mr. Suh is entitled to judgment with respect to all of the Plaintiffs’ claims against him.

“12. Upon completion of Phase 2, Defendant Van Khanh Bui, a bona fide purchaser for value with respect to the Lexington Gallatin property, also moved for judgment on the basis of the Court’s findings on the forgery issue. The Court finds that Van Khanh Bui is entitled to judgment with respect to the Plaintiffs’ claims against him.

“13. Upon completion of Phase 2, defendants Kenny Wong, Thuan My Lam, and Kimberly Wong also moved for judgment on the basis that, in light of the Court’s findings on the forgery claim, there were no remaining viable claims of the Plaintiffs against Mr. Wong. Defendant Jennifer Tran Vu separately moved for judgment on those grounds. The Court determines that this issue requires further consideration, and will render a decision after review of briefs to be submitted by the parties.”

d. *Subsequent proceedings.*

After reviewing the post trial briefs, the trial court ruled that inasmuch as plaintiffs were unable to prove a forgery of the deeds by Kenny Wong, judgment must be entered on behalf of the defendants as a matter of law on all remaining causes of action in the third amended complaint.

The plaintiffs appealed.

3. *The prior appeal.*

In the prior appeal, we held the trial court erred in requiring plaintiffs to prove by clear and convincing evidence that Kenny Wong forged Mrs. Wong’s name to the Lexington deeds. On the forgery claim to set aside fraudulent transfer of real property, the applicable standard was proof by a preponderance. It could not be said the trial court’s error in applying a heightened standard of proof to the forgery claim was

harmless. Therefore, the issue of whether the Lexington deeds were a forgery would have to be retried on remand pursuant to the proper standard of proof.

We further held that even assuming the deeds were not forged and that Kenny Wong signed said deeds as Mrs. Wong's amanuensis, because he was an *interested* amanuensis, the deeds were presumptively invalid, shifting the burden to him to show the transaction was free from fraud and undue influence. We concluded "The trial court did not assign any burden to Kenny Wong and therefore failed to conduct the proper inquiry. On remand, the burden will rest upon Kenny Wong to establish the validity of the transfer of Lexington to him in accordance with these principles."

The disposition of the prior appeal was as follows: The judgment in favor of the purchaser of the Ashmont property and the lender on that property was affirmed. The judgments in favor of the remaining defendants were reversed, the matter was remanded for further proceedings consistent with this court's opinion, and the trial court was directed to accept the proposed fourth amended complaint for filing.⁴

4. *Proceedings on remand.*

a. *Bui's renewed motion for judgment and opposition thereto.*

On remand, Bui filed another motion for judgment (§ 631.8), contending he was entitled to judgment because "the plaintiffs rested their case after presenting virtually no evidence that could support a finding of forgery." If the deeds were not forged, plaintiffs were incapable of prevailing as against Bui, a bona fide purchaser for value.

"A preponderance of evidence establishes that Kenny Wong acted as an amanuensis, interested or otherwise. If he did, then the deeds are not void, but only voidable. If that is the case, then plaintiffs have no claim against the Lexington . . . property, and the Court can enter judgment in favor of [Bui] as to title to the property."

⁴ In addition, the disposition directed the clerk to forward a copy of the opinion to the California Secretary of State, Notary Public Section, for possible discipline of notary Suh.

In opposition, plaintiffs contended Bui was not entitled to judgment because this court reversed and remanded the case for a new trial, and this court specifically held the issue whether the Lexington deeds were a forgery must be retried on remand pursuant to the proper standard of proof, i.e., a preponderance. Plaintiffs indicated they “will be demanding trial by jury when this case is re-tried.” Plaintiffs argued Kenny Wong admitted he actually signed Mrs. Wong’s name to the Lexington deed, and unless Kenny Wong could convince the trier of fact that his conduct fell within the amanuensis rule, his conduct would constitute a forgery, rendering the deed void.

In reply, Bui contended plaintiffs were not entitled to a jury, in that they already had waived a jury trial in this action. Further, plaintiffs were not entitled to a whole new trial on all issues; with respect to the motion for judgment brought by Bui, the trial court on remand was simply required to reconsider the motion for judgment pursuant to the proper standard of proof. Finally, the disputed deed was not a forgery and therefore was not void; at most, the Lexington deed was invalid because Kenny Wong signed Mrs. Wong’s name as an interested amanuensis; however, such invalidity had no bearing on the validity on the title obtained by Bui.

b. *Trial court’s ruling.*

On May 29, 2009, after taking the motion for judgment under submission, the trial court ruled as follows:

“This case was reversed and remanded for the purpose of applying the proper standard of proof. It was not reversed and remanded for any error concerning the evidence. Therefore, re-trying, or re-weighing the evidence presented at trial, the court finds that plaintiffs failed to establish by preponderance of the evidence that the Lexington deed was a forgery. Motion for judgment is granted in favor of defendant Bui pursuant to CCP 631.8.”

The trial court added, “[t]his case was also remanded for the purpose of requiring defendant Kenny Wong to establish by preponderance of the evidence that the transfer to him was free of fraud, duress, or undue influence. Trial on that portion of the case will be calendared for a date in the near future. Assuming that defendant Kenny Wong fails

to carry his burden, the Lexington deed to him will be declared void. However, Bui having taken title at a time when the deed was merely voidable and not void, is protected by his bona fide purchaser status.”

c. Entry of judgment in favor of Bui.

On July 17, 2009, the trial court entered judgment in favor of Bui. The judgment includes the following findings: “1. The evidence presented by the Plaintiffs was insufficient to establish by a preponderance of evidence, any forgery by Mr. Wong; [¶] 2. Because there was no forgery, the deed executed by Mr. Wong in his wife’s name, transferring title to the Lexington . . . Property from Mrs. Wong to Mr. Wong, was not void at the time it was made, and was sufficient to pass title to Mr. Wong; [¶] 3. Defendant [Bui] was a bona fide purchaser for value with respect to his purchase of the Lexington . . . Property from Mr. Wong. Accordingly, Mr. Bui’s title prevails against any claim by the Plaintiffs. Venture One Mortgage, named herein as a Doe defendant based solely on a lien against Mr. Bui’s interest in the Lexington . . . Property, is also entitled to judgment with respect to whatever interest it may have in the Lexington . . . Property. [¶] 4. Plaintiffs have no interest, legal, beneficial, or otherwise, in the Lexington . . . Property.”

Plaintiffs filed a timely notice of appeal from the judgment.

CONTENTIONS

Plaintiffs contend: the trial court refused to follow the directions of the appellate court in reversing and remanding for a new trial; the appellate court’s determinations that Kenny Wong was an interested amanuensis and this his signing his wife’s name to the Lexington deed must be presumed invalid and that the issue of forgery must be retried on remand were binding on the trial court as law of the case; and the trial court ignored plaintiffs’ request that retrial be before a jury.

DISCUSSION

1. *On Bui's motion for judgment, the trial court properly reconsidered the matter pursuant to a noticed motion; plaintiffs were not entitled to relitigate the issue before a jury.*

Plaintiffs contend the trial court erred in entering judgment in favor of Bui on a motion for judgment (§ 631.8) instead of following this court's directive, which reversed the judgment and remanded for a new trial. The contention is unavailing.

a. *General principles.*

Whether a jury waiver in the original trial affects the right to jury on retrial depends on the nature of the retrial. When a judgment is reversed on appeal for trial de novo, the right to jury trial is restored. "[T]he cause stands as if it had never gone to trial and the parties are restored to their original positions and rights." (*Spaulding v. Cameron* (1954) 127 Cal.App.2d 698, 701.) On the other hand, where an appellate court remands for retrial of "*issues that could have been decided originally*," a jury waiver in the original trial is binding as to the subsequent proceedings. (*Id.* at p. 702, italics added.) The situation is the same as if "the trial court of its own volition had reopened the case or had vacated its findings and judgment in part and had proceeded to determine the questions which it eventually did determine pursuant to the directions of the [reviewing court]." (*Id.* at p. 703; see generally, 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 881.)

b. *Our prior decision directed the trial court to reconsider the forgery issue under the correct standard of proof; plaintiffs were not entitled to relitigate the entire case to a jury.*

The disposition of the previous appeal was a reversal and remand "for further proceedings consistent with this opinion." With respect to whether the Lexington deeds were forged, we held the trial court erred in applying the heightened standard of *clear and convincing evidence*, and in granting a defense motion for judgment (§ 631.8) on the ground plaintiffs failed to present clear and convincing proof the Lexington deeds were forged. We concluded "the issue of whether the Lexington deeds were a forgery must be

retried on remand pursuant to the proper standard of proof,” namely, the preponderance standard.

On remand, the trial court recognized the limited nature of the issue before it. The trial court observed: “This case was reversed and remanded for the purpose of applying the proper standard of proof. It was not reversed and remanded for any error concerning the evidence. Therefore, *re-trying, or re-weighing the evidence presented at trial, the court finds that plaintiffs failed to establish by preponderance of the evidence that the Lexington deed was a forgery.* Motion for judgment is granted in favor of defendant Bui pursuant to CCP 631.8.” (Italics added.)

The application of the correct standard of proof to the evidence of forgery could have, and should have, occurred at the original bench trial. (*Spaulding v. Cameron, supra*, 127 Cal.App.2d at p. 702.) On remand, the trial court simply was required to reweigh the evidence adduced at the original trial pursuant to the correct standard of proof. Therefore, on remand, the trial court properly reweighed the evidence pursuant to the preponderance standard, rather than conducting a plenary trial on the forgery issue. Plaintiffs were not entitled to relitigate the entire matter de novo before a jury, and the trial court was not required to conduct a jury trial on the forgery issue so as to enable plaintiffs to recall all the witnesses and have them repeat their testimony to a jury.

2. Plaintiffs’ contention relating to Kenny Wong’s status as an interested amanuensis has no bearing on Bui’s status as a bona fide purchaser; plaintiffs’ claims against Kenny Wong remained to be tried.

Plaintiffs contend this court’s determination that Kenny Wong was an interested amanuensis is law of the case, and that Kenny Wong must bear the burden to establish the validity of transfer of the Lexington property to him. Plaintiffs aver the trial court erred in granting Bui’s motion for judgment (§ 631.8) because Kenny Wong, not the plaintiffs, had the burden of proof, and Kenny Wong did not even put on a case at trial. The argument fails.

In our previous decision, we held that even assuming the deeds were not forged and that Kenny Wong merely acted as Mrs. Wong's amanuensis, because he was an interested amanuensis, the deeds were presumptively invalid, shifting the burden to him to establish the validity of the transfer of the Lexington property to him.

However, the pertinent matter before the trial court on remand was Bui's renewed motion for judgment (§ 631.8), not plaintiffs' claims against Kenny Wong. At the same time the trial court granted Bui's motion for judgment, the trial court noted, "[t]his case was also remanded for the purpose of requiring defendant Kenny Wong to establish by preponderance of the evidence that the transfer to him was free of fraud, duress, or undue influence. *Trial on that portion of the case will be calendared for a date in the near future.*" (Italics added.)

Thus, as the trial court recognized, plaintiffs' claims against Kenny Wong remained to be litigated. However, notwithstanding plaintiffs' claims against Kenny Wong, because plaintiffs failed to establish a forgery, Bui was entitled to judgment as a bona fide purchaser for value, without regard to the resolution of plaintiffs' claims against Kenny Wong. (*Fallon v. Triangle Management Services, Inc.* (1985) 169 Cal.App.3d 1103, 1106.)

3. *Plaintiffs were not entitled to a jury trial on their claims against Bui; the trial court properly resolved plaintiffs' claims against Bui by reconsidering Bui's motion for judgment pursuant to the correct standard of proof.*

Plaintiffs' final contention is a reiteration of their argument that they were entitled to a jury trial on remand. Plaintiffs contend the trial court "ignored" their request that retrial be before a jury. They point to their posting of jury fees on April 24, 2006. However, those jury fees were posted *before* the original bench trial; plaintiffs subsequently waived a jury and the first trial, in 2007, was before the court sitting within a jury. On remand, in opposing the renewed motion for judgment, plaintiffs they "will be demanding trial by jury when this case is re-tried." However, plaintiffs' stated intention to request a jury trial at a later date did not preclude the trial court from ruling on Bui's renewed motion for judgment, which was then pending before the court.

DISPOSITION

The judgment in favor of Bui is affirmed. Bui shall recover costs on appeal.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.